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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

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1. The participation in this case of several *amici curiae*, representing a wide range of interests and all urging that this Court grant the petition for a writ of certiorari, testifies eloquently to the substantial importance of the question presented.[1] Respondent does not contest the importance of the issue. Instead, respondent argues that the case was correctly decided below because, it claims, *Widmar* v. *Vincent*, 454 U.S. 263 (1981),

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[1] Six briefs *amici curiae* have been submitted, representing, *inter alia*, twenty-four United States Senators, the Texas Association of School Boards, students and parents in Lubbock, Texas, and several national church groups and other religious organizations.

is distinguishable, whereas *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), is not. A fuller discussion of those cases therefore may be helpful to the Court.

In *Widmar*, a public university had barred student religious groups from meeting in its facilities, even though it made those facilities available to other student groups. Members of a student religious group challenged the university's action as, *inter alia*, an abridgment of their freedom of speech. This Court held that the university's action did abridge free speech. The Court's holding, however, rested upon an analysis of the Establishment Clause.

The Court began with the proposition that "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University . . . must show that its regulation is necessary to serve a compelling state interest . . . ." 454 U.S. at 269-70. The "compelling interest" asserted by the university was that "it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause . . . ." *Id.* at 270-71. Consequently, the Court was required to consider and decide whether it is an unconstitutional establishment of religion to permit voluntary student religious groups to meet in public university facilities in the same manner as other voluntary student groups. Applying the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971), the Court determined that a nonpreferential policy of equal access would not contravene the Establishment Clause. 454 U.S. at 271-75. It followed that the university had no compelling interest, and therefore no legal justification, for its refus-

al to permit student religious groups to meet in its facilities. *Id.* at 277.

Thus, respondent plainly errs in portraying *Widmar* as a case that "turned not on the religion clauses [of the First Amendment]." Br. in Opp. 8. The Court's disposition of the university's arguments under the Establishment Clause was integral to its analysis and necessary to its decision. Moreover, it is evident that the issue under the Establishment Clause that was decided in *Widmar* is virtually identical to the issue presented here. If anything, therefore, our petition was guilty of understatement when it asserted that "[t]he Fifth Circuit's decision appears to be inconsistent with this Court's decision last Term in *Widmar* v. *Vincent* . . . ." Pet. 8.

This case differs from *Widmar* only in two respects. First, this case arose in a different manner: whereas in *Widmar* the state had abridged speech and students sued to vindicate their rights, here the state has permitted speech and respondent is seeking a judicial abridgment. Second, this case involves a public school rather than a public university. These two differences indicate that, as the petition stated, "the question presented here is whether a public school *may* provide voluntary student religious groups with the equal access that a public university *must* provide under *Widmar*." Pet. 8-9 (emphasis in original). The Second Circuit's decision in *Brandon*, which was handed down before *Widmar* was decided, cannot answer this question. Because of respondent's reiterated reliance upon *Brandon*, however, that case warrants extended comment.

The facts in *Brandon* lay somewhere between those here and those in *Widmar*. On the one hand, *Brandon* involved a public school, not a public university. On the other hand, *Brandon* arose in the same manner as *Wid-*

mar: the school had discriminatorily excluded student religious groups from the use of its facilities, and students sued "to be treated in a manner similar to the secular student groups permitted to use the school's facilities." 635 F.2d at 974. The Second Circuit reasoned that the students could not complain of an abridgment of their freedom of speech, because "a high school is not a 'public forum' where religious views can be freely aired." *Id.* at 980. This aspect of *Brandon* need not detain us. The question whether a high school is a public forum does not arise in this case; the issue here concerns not whether speech has been abridged but, rather, whether it may be permitted.

Because the Second Circuit concluded that the student-plaintiffs in *Brandon* had no affirmative constitutional right to use the school's facilities, [2] it was not forced to consider whether such use would be barred by the Establishment Clause. The court nevertheless proceeded to consider that issue and to decide that to permit student religious groups to use school facilities on the same basis as other student groups would contravene the Establishment Clause. Respondent appears to believe that this Court's denial of the petition for a writ of certiorari in *Brandon* endorses the Second Circuit's decision on this point and amounts to a determination that the view of the Establishment Clause set forth in *Widmar* applies only to public universities and not to public schools. Br. in Opp. 7-8, 22. Respondent's belief is ill-founded. It is well understood that "denial of a petition for a writ of certiorari . . . carries with it no implication whatever

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[2] In addition to holding that there was no abridgment of the freedom of speech, the court held that the school's discriminatory exclusion of student religious groups did not prohibit free exercise of religion. *See* 635 F.2d at 975-78.

regarding the Court's views on the merits of [the] case which it has declined to review." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari).

Beyond that, there is a special reason to refrain from giving weight to the denial of certiorari in *Brandon*. At the time this Court acted in *Brandon*, less than one week after the decision in *Widmar*, it apparently had the erroneous impression that the students in *Brandon* were seeking a favored status for religious groups *vis-a-vis* other student groups. Those were not the facts in *Brandon*. *See* 635 F.2d at 974, 978, 980. But the original slip opinion in *Widmar* stated:

> This case is different from the cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon* v. *Board of Educ.*, 635 F.2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396.

50 U.S.L.W. 4062, 4065 n.13 (Dec. 8, 1981) (emphasis in original). This incorrect reference to *Brandon* was deleted from the opinion subsequently published in the official reports. *See* 454 U.S. at 273 n.13. Of course, singular favoritism to religious groups would be suspect under the Establishment Clause, and it is readily understandable that this Court would have denied certiorari in a case where the Court believed such favoritism had been unsuccessfully sought.

No favoritism to religion is involved here. Petitioner Lubbock Independent School District has adopted a neutral, nonpreferential policy of allowing voluntary student religious groups to meet in school facilities outside regular school hours on the same basis as other voluntary student groups. If the School District were a public university, adoption of that policy would have been con-

stitutionally required under *Widmar*. This Court should take this case to determine whether the Establishment Clause imposes a diametrically opposite obligation upon public schools.

2. Respondent's discussion of the three-part test of *Lemon* v. *Kurtzman* ignores this Court's recent application of that test.

a. In *Widmar*, this Court stated that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose . . . ." 454 U.S. at 271 (footnotes omitted). Respondent nevertheless suggests that, because public school students are more "susceptible to religious indoctrination," Br. in Opp. 11, an open-forum policy does not serve a secular purpose in public schools. But talk of indoctrination and "religious teaching," *id.* at 12, is beside the point. This case involves no religious teaching and, indeed, no state-initiated or state-conducted religious activity of any kind.[3] All that is involved here is the nonpreferential availability of school facilities for use by voluntary stu-

[3] Every case in which this Court has found a public school to be in violation of the Establishment Clause has involved either formal religious instruction or state-initiated or state-conducted religious activity. *See Stone* v. *Graham*, 449 U.S. 39 (1980) (posting copies of the Ten Commandments on school walls); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (requiring reading of Biblical passages and recitation of the Lord's Prayer); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (requiring recitation of prayer); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (permitting formal religious instruction on school premises during school hours); *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (requiring opportunity for public prayer during class).

dent groups outside regular school hours.[4] Even the court of appeals below appeared to recognize that a neutral policy of this kind could serve a secular purpose. *See* Pet. App. A, p. 13a.[5]

b. Respondent argues that the School District's policy of equal access serves to advance religion merely because it "appears as a part of a policy on religious activities in the schools . . . ." Br. in Opp. 14. This is an effort to make something out of nothing. The School District had been driven by this very litigation to review its "policies relating to religion in the schools." Pet. App. B, p. 30a n.1. Following that review, the policy of equal access was adopted as part of an effort to replace prior unconstitutional practices with a posture of strict neutrality toward religion. *See* Pet. 3-4. This background does not invalidate an otherwise constitutional policy of equal access. [6]

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[4] The content-neutral supervision of physical school premises contemplated by the School District's policy of equal access does not constitute religious teaching. Respondent nevertheless implies that religious instruction may take place. Br. in Opp. 11 n.14. *See also id.* at 13-14 n.17, 14 n.18, 17 n.23. If in fact the School District's policy were implemented in a manner that entailed religious instruction, or that favored one religious group over others, that would be improper. But that is not this case. The issue here is merely one of the facial validity of the School District's stated policy of equal access. *See* Pet. App. B, p. 32a.

[5] The court of appeals misguidedly rested its determination of the absence of secular purpose in this case upon the fact that the School District's policy was adopted as part of an effort to establish a posture of strict neutrality toward religion. *See* Pet. 3-4, 10 n.9.

[6] The petition points out that the policy of equal access does not act coercively "to infringe the rights of free exercise of [nonparticipating] children . . . ." Pet. 12, *quoting Abington School District* v. *Schempp*, 374 U.S. at 288 (Brennan, J., concurring). Respondent, misapprehending this point, states that "[c]oercion is not the issue."

c. In arguing that the School District's policy of equal access involves the state in an excessive entanglement with religion, respondent relies upon the "supervision requirement, . . . and the free benefit of school facilities, classrooms, heat and light . . . ." Br. in Opp. 16 n.22.[7] But content-neutral supervision of the school's physical premises, which is all that is contemplated by the School District's policy, is not unconstitutional. *See* note 4, *supra*. "[T]he minimal precautions the school would have to take for its property and rules when any student group meets in its facilities," Pet. App. D, p. 41a, like the placing of a security guard at a school athletic event, does not amount to "excessive entanglement," *id.* As for the benefits of space, heat, and light, they did not raise problems of constitutional dimension in *Widmar* and therefore cannot do so here either.

3. The petition explains that the Establishment Clause does not require discrimination against religion. Pet. 15-16. Respondent replies that a policy generally favoring religion would be unlawful. Br. in Opp. 18-19. Respondent's observation is beside the point. The School District's policy of equal access does not generally favor religion. It merely treats student religious groups in the same manner as other student groups. Such even-handed

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Br. in Opp. 15. Yet, respondent goes on to complain that "the Texas compulsory education machinery . . . draws the students to school . . . ." *Id.* (footnote omitted). *See also id.* at 16 n.22. However, the School District's policy of equal access permits meetings to be held only outside regular school hours, when the state's "compulsory education machinery" is inoperative.

[7] Respondent also relies upon "the compulsory attendance machinery . . . ." Br. in Opp. 16 n.22. For reasons already discussed, this reliance is misplaced. *See* note 6, *supra*.

neutrality comports with the Establishment Clause. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947). [8]

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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[8] Respondent also argues that it is improper for the School District to receive financial and legal support from others in order to defend itself against respondent's legal attack. Br. in Opp. 19-21. The contrary is well established. *See, e.g.*, Disciplinary Rule 5-107 of the Code of Professional Responsibility.